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SUPREME COURT, U.S.

No. 06-912

In the Supreme Court of the United States

MICHAEL ADAIR, et al.,

Petitioners,

v.

CHARTER COUNTY OF WAYNE,
a municipal corporation, et al.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF IN OPPOSITION

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COUNTER-STATEMENT QUESTIONS PRESENTED FOR REVIEW

I. Have Petitioners shown any compelling reason for review by this Court as to Petitioners' retaliation claim under 42 U.S.C. § 1983, where the decision of the Sixth Circuit Court of Appeals comported with the majority view of courts that have considered whether a public employee claiming retaliation under the Petition Clause must demonstrate that a matter of public concern was involved?

II. Have Petitioners shown any compelling reason for review by this Court as to Respondents' municipal immunity, where the decision of the Sixth Court of Appeals was based on the specific facts before it, and comported with existing Supreme Court law?

PARTIES TO THE PROCEEDINGS

The Petitioners are Michael Adair, William Childress, Leon Denton, Charles Elstone, Richard Frederick, Richard Hitch, Ernest Hunter, Charles Johnson, Victor Kline, John Malaniak, Michael Molitor, Paul Molitor, Peter Molitor, David Okoney, Dean Pigott, Bruce Preston, Michael Tavtigian, John Teschke, Robert Tipton, and Bradford Vincent.

The Respondents are Charter County of Wayne, a municipal corporation, and Detroit Metropolitan Wayne County Airport Authority, a municipal corporation.

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The opinion of the Sixth Circuit Court of Appeals is officially reported at 452 F.3d 482 (6th Cir. 2006).

JURISDICTION

The decision of the Sixth Circuit Court of Appeals was filed on June 22, 2006. The Sixth Circuit Court of Appeals' Order denying Plaintiffs' Motion for Rehearing/Rehearing En Banc was filed on October 2, 2006. The jurisdiction of this Court is invoked by Petitioners pursuant to 28 U.S.C. § 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

First Amendment

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people to peaceably assemble, and to petition the Government for a redress of grievances.

42 U.S.C. § 1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage of any State or Territory of the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within its jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

COUNTER-STATEMENT OF FACTS

In March 2002, a group of 30 law enforcement officers employed at that time by the Wayne County, Michigan Sheriff's Department and assigned to the Wayne County

Metropolitan Airport Police Department,[1] filed suit under the Fair Labor Standards Act[2] seeking compensation (at one and one-half times their normal rate of pay) for all off-duty hours during which they carried a beeper or pager. Because these police officers carried their pagers at all times, the suit sought compensation for 24 hours a day, 365 days a year. To justify their claim for pay, the officers argued that carrying the pagers was onerous and severely interfered with their personal lives.

To relieve them, and all other officers assigned to the Airport, of this burden, the Airport's Director of Public Safety[3] requested that all of the Airport's law enforcement officers turn in their pagers. The officers who had sued for overtime then amended their Complaint, adding FLSA retaliation claims. Several other officers, who were not part of the original lawsuit, also joined the suit, claiming that their pagers were removed in retaliation for their protected activity – even though the protected activity was the lawsuit that they joined only *after* the alleged retaliation.

At this same time, the airport was engaged in cost-saving efforts dictated by the increased security demands following the September 11, 2001 terrorist attacks. The Airport's Director of Public Safety therefore modified a number of

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[1] Some months after the suit was filed, a new entity, called the Wayne County Airport Authority, was created by the Michigan legislature, and became Petitioners' employer. Mich. Comp. Laws §§ 259.108 et seq.

[2] 29 U.S.C. §§ 211 et seq.

[3] The Airport's Director of Public Safety was Mark DeBeau, who was named as an individual defendant in Plaintiffs' original suit. The District Court determined that Mr. DeBeau was immune from liability, and the Sixth Circuit affirmed. He is not a party to this action.

practices affecting all of the officers employed at the Airport, including those officers who had filed the FLSA suit. Plaintiffs nonetheless claimed that those changes – the elimination of "comp time" in favor of overtime and the assignment of county-owned, fully equipped SUVs to the airport's K-9 officers – were not an effort to save money, but were personally directed at them, in retaliation for their lawsuit.

During the course of the litigation, Plaintiffs filed several amended complaints, but did not assert their claim of retaliation in violation of their First Amendment Rights under 42 U.S.C. § 1983 until May 23, 2003, after the Airport had filed its Motions for Summary Judgment. In October 2004, the District Court dismissed all of Plaintiffs' claims, including their § 1983 claims.

The Sixth Circuit Court of Appeals affirmed the District Court's decision in June 2006, in a decision reported at *Adair v. Charter County of Wayne,* 452 F.3d 482 (6th Cir. 2006). That court held that:

- Plaintiffs were not entitled to overtime pay under the FLSA because their off-duty time was utilized predominantly for their personal benefit, and not for their employers' benefit. *Adair,* 452 F.3d at 489.
- Plaintiffs were not entitled to damages under the FLSA for alleged retaliation because the complained-of acts were not materially adverse employment actions. Further, there was no evidence that those actions were caused by the filing of Plaintiffs' lawsuit, in part because the changes were applied to all of the Airport's officers and not just to Plaintiffs. *Id.* at 490-491.

- Plaintiffs failed to state a claim under 42 U.S.C. § 1983 because they had not proved that either their speech or their lawsuit for overtime pay touched on matters of public concern. *Id.* at 492.
- Both Wayne County and the Airport were immune from liability because the alleged retaliatory acts were not made by a final policymaker, and thus were not the official policy or custom of the Airport or the County. *Id.* at 493.

REASONS THE PETITION SHOULD BE DENIED

I. THERE IS NO TRUE "SPLIT AMONG THE CIRCUITS"

Litigants have no absolute right to review upon a writ of certiorari, which instead is a matter committed to this Court's discretion. In exercising that discretion, the Court may consider whether the court of appeals in the case before it "entered a decision in conflict with the decision of another United States court of appeals on the same important matter." S. Ct. R. 10(a). Petitioners in this case claim that grant of their Writ is justified because of a conflict among the circuit courts of appeal. A "conflict" exists only in the most limited sense, however. The Sixth Circuit Court of Appeals decision below was consistent with the overwhelming majority of circuit courts that have considered the question of whether a public employee claiming retaliation by her employer under the Petition Clause must demonstrate that her actions involved an issue of public concern. Nine circuit courts of appeals have concluded that such a showing is required; only a single circuit has decided otherwise. No significant split among the circuits exists to justify this Court's review of Petitioners' claims.

In *Connick v. Myers,* 461 U.S. 138, 140 (1983), this Court recognized that, while "a public employee does not relinquish First Amendment rights to comment upon matters of public interest by virtue of government employment," the government does retain a significant interest in regulating the conduct of its employees. "[W]hen a public employee speaks not as a citizen upon matters of public concern, but instead as an employee upon matters only of personal interest . . . a federal court is not the appropriate forum in which to review the wisdom of a personnel decision taken by a public agency allegedly in reaction to the employee's behavior." *Id.* at 147. The *Connick* court therefore adopted a test balancing the interests of the public employer in ensuring a smoothly functioning workplace against the rights of its employees. The rights of an employee thus can be limited when that employee is acting as an employee, seeking to advance her personal interests, rather than as a citizen acting for the public good. *Id.* at 146. Unless the alleged protected activity addresses a matter of public concern, then, it is not activity protected under the First Amendment.

Although the plaintiff in *Connick* had sought vindication of her Free Speech rights, rather than her Petition Clause rights, this Court has also determined that "the right to petition is cut from the same cloth as the other guarantees of [the First] Amendment." *McDonald v. Smith,* 472 U.S. 479 (1985)(Holding that the Petition Clause does not provide absolute immunity from a libel action).

Armed with these strictures from the Supreme Court, nine of this country's circuit courts of appeals have applied the "public concern" requirement to plaintiffs alleging retaliation by their governmental employer in violation of the Petition Clause. *See White Plains Towing Corp. v. Patterson,* 991 F.2d 1049 (2d Cir.), *cert. denied,* 510 U.S. 865 (1993); *Kirby v. City of Elizabeth City, North Carolina,* 388 F.3d 440

(4th Cir. 2004); *cert. denied*, -- U.S. -- , 126 S. Ct. 2350, 165 L.Ed.2d 294 (2006); *Rathjen v. Litchfield*, 878 F.2d 836 (5th Cir. 1989); *Valot v. Southeast Local School Dist. Bd. of Ed.*, 107 F.3d 1220 (6th Cir.), *cert. denied*, 522 U.S. 861 (1997); *Zorzi v. County of Putnam*, 30 F.3d 885 (7th Cir. 1994), *reh'g and reh'g en banc denied; Hoffman v. Mayor, Councilman and Citizens of City of Liberty*, 905 F.2d 229 (8th Cir. 1990); *Rendish v. City of Tacoma*, 123 F.3d 1216 (9th Cir. 1997), *reh'g and reh'g en banc denied*, 134 F.3d 1389, *cert. denied*, 524 U.S. 952 (1998); *Martin v. City of Del City*, 179 F.3d 882 (10th Cir. 1999); *Grigley v. City of Atlanta*, 136 F.3d 752 (11th Cir.), *cert. denied*, 525 U.S. 819 (1998).

Only one circuit – the Third Circuit – has reached a contrary conclusion. *San Filippo v. Bongiovanni*, 30 F.3d 424 (3d Cir. 1994), *cert. denied*, 513 U.S. 1082 (1995). That court determined that the U.S. Constitution's Petition Clause is broader than its Free Speech clause and provides even greater protection, in part because it seemed to the court paradoxical that a government could establish a process for "redress of grievances" such as a judicial system, and then discipline a public employee for utilizing that very process. *Id.* at 439.

Thirteen years have passed since the *San Filippo* decision. In that time, not a single other circuit has joined in the Third Circuit's analysis. Those circuits that have considered the Petition Clause/public concern issue anew during those years have expressly rejected *San Filippo* as inconsistent with Supreme Court precedent. *See, e.g., Rendish*, 123 F.3d at 1223; *Grigley*, 136 F.3d at 754; *Martin*, 179 F.3d at 887-888.

Contrary to Petitioners' bare assertion that, after *San Filippo*, courts "have failed to give this issue the sort of independent analysis it deserves" [Petition at p. 13], subsequent decisions have indeed analyzed (and rejected) the

arguments set forth in *San Filippo*. In *Rendish*, for example, the Ninth Circuit Court of Appeals carefully reviewed the Supreme Court decisions in *Connick*, which delineated the scope of public employees' constitutional rights, and *McDonald*, and concluded that providing greater protection to a public employee who "through foresight or mere fortuity" presents her speech as a grievance or in a lawsuit rather than as pure speech would implement "precisely the sort of hierarchy of first amendment rights forbidden by *McDonald*." 123 F.3d at 1222, *quoting Belk v. Town of Minocqua*, 858 F.2d 1258, 1261-1262 (7th Cir. 1988). The court stated: "We respectfully disagree with the Third Circuit's analysis. First, it diverges from the Supreme Court's teachings that the primary function of the First Amendment is to facilitate participation in a free political process and that the First Amendment extends its guarantees to public employees in order to encourage such participation. Moreover, it equates the government's conduct as employer with its conduct as government. When government as employer disciplines an employee for pursuing litigation, it does not act as 'the very government' which established the mechanism for redress . . . but rather in its role as an employer." 123 F.3d at 1223.

This Court thus should deny Petitioners' Writ because the great majority of circuit courts of appeal have correctly concluded that only when a public employee acts as a citizen, rather than as an employee acting to protect or advance her personal interests, is that employee protected by the First Amendment.

II. THE SIXTH CIRCUIT'S DECISION IS CONSISTENT WITH ITS PREVIOUS DECISIONS ON THIS ISSUE

In further support of their Writ, Petitioners claim – incorrectly -- that the decision below is inconsistent with prior decisions of the Sixth Circuit and that such "confusion" needs to be corrected by this Court. [Petition at pp. 4, 9] This argument should be rejected first because "[i]t is primarily the task of a Court of Appeals to reconcile its internal difficulties." *Wisniewski v. United States,* 353 U.S. 901, 902 (1957). Secondly, there is no confusion in need of resolution because the decision of the Sixth Circuit below was entirely consistent with its previous decisions.

Petitioners claim that the Sixth Circuit decision in *Gable v. Lewis,* 201 F.3d 769 (6th Cir. 2000) *reh'g and reh'g en banc denied,* is somehow at odds with its decision in the present case, as well as with its rulings in *Jones v. Union City,* 296 F.3d 417 (6th Cir. 2002) and *Valot, supra.* This is simply incorrect. The issue confronted by the court in *Gable* was not whether a public employee alleging retaliation under the Petition Clause must demonstrate that her actions involved a matter of public concern. The plaintiff in *Gable* was not a public employee at all, but "simply a citizen offering services to a state agency." *Gable,* 201 F.2d at 771. The Sixth Circuit thus declined to require evidence of a public concern, because "the reason for the test is missing in the present case – maintaining order in the governmental workplace." *Id.*

In contrast, the plaintiffs in *Valot, supra,* and *Jones, supra* were public employees – as were Petitioners in this case. Consistent with the decisions of many circuits, the Sixth

Circuit has crafted a clear and rational approach to the issue.[4] It is neither internally inconsistent nor confusing and does not require intervention by this Court.

III. THE SIXTH CIRCUIT'S CONCLUSION THAT PETITIONERS WERE NOT ENGAGED IN PROTECTED ACTIVITY WAS NOT OUTCOME-DETERMINATIVE

No compelling reason exists for this Court to review the decision below because the issue urged upon the Court for review did not determine the Sixth Circuit's ultimate decision. While the Sixth Circuit concluded that Petitioners had not established either a Free Speech or Petition Clause claim, the court went on to state that, "[e]ven if Plaintiffs were able to demonstrate that they were deprived of a federal constitutional right. . . they must also show that an official policy or custom of Wayne County or the Airport was the moving force behind the constitutional violation." *Adair, supra,* 452 F.3d at 492-493. Applying the specific facts of the case to the standards for municipal liability crafted by the Supreme Court in *Monell v. Dep't of Soc. Services,* 436 U.S. 658 (1978) and *Pembaur v. City of Cincinnati,* 475 U.S. 469 (1986), the Sixth Circuit determined that neither the County nor the Airport had adopted an official policy or custom resulting in a constitutional injury to Petitioners. *Id.* at 493. The court relied on two factors in reaching this conclusion: first, that the alleged retaliatory actions (removal of pagers, modification of rules for the use of compensatory time; provision of SUVs to

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[4] *See, for example, Thaddeus-X v. Blatter,* 175 F.3d 378, 392 (6th 1999)(en banc), in which the Sixth Circuit concluded that the "public concern" test did not apply to a *prisoner's* right to petition the government, because the government's interest in a harmonious workforce was not at issue.

the K-9 unit) were not taken by County or the Airport itself but by the Airport's Director of Public Safety. Petitioners' contentions notwithstanding, the court below stated that even while such a position "carries with it considerable influence," it is not the position of a final policymaker. *Id.* The court noted further that the specific actions alleged by Petitioners as violative of their constitutional rights "lack the sort of force and finality characteristic of official municipal policy." *Id., citing City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247 (1981) and *Monell, supra.* [5]

Thus, the Sixth Circuit held that, even if Petitioners had engaged in protected activity, their § 1983 claim still would fail, because the Airport and County were immune from liability. Even if this Court were to reverse the Sixth Circuit's conclusion that Petitioners were required to demonstrate that their lawsuit was a matter of public concern, the ultimate result of the case would not be affected. There thus are no compelling reasons to grant the Writ, and so it should be denied.

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[5] Petitioners attempt to sidestep this weakness in their claim by urging this Court also to review that aspect of the decision below. [Petition at pp. 19-20] Petitioners fail to articulate even the most modest justification for review of that issue, however, claiming only that the Sixth Circuit made a factual error, because the Director of Public Safety had "decision making authority." That hardly rises to the level of being a "final policy maker," however, and presents no compelling reason for this Court to review the factual determination made below.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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